

## **I. SUMMARY AND REQUEST FOR ORAL ARGUMENT**

Appellant Daniel Greatwalker appeals from the jury verdict of November 20, 2002 finding him guilty of first-degree murder in violation of 18 U.S.C. § 1111, assault with intent to commit murder in violation of 18 U.S.C § 113(a)(1), guilty of assault resulting in serious bodily injury in violation of 18 U.S.C § 113(a)(6), and assault with intent to do bodily harm and without just cause and excuse in violation of 18 U.S.C. § 113(a)(3), all relating to the death of Linus Walette on April 1, 2000. Judgment was entered on December 13, 2002, the Honorable Patrick Conmy presiding. Greatwalker was sentenced to life in prison by Judge Conmy.

Greatwalker raises four issues:

1. Whether the jury selection process improperly excluded Native Americans from the jury.
2. Whether the government denied the defendant full discovery by failing to disclose or provide agent's notes of witness interviews under government and court's open-file policy.
3. Whether the lower court, in a case where there was evidence that others were involved in the fight and evidence that the defendant's former co-defendant was actually the murderer, erred in refusing to allow into evidence the results of the lie detector tests that showed that the persons who

testified against the defendant and were on the scene at the time of the death failed to pass the tests.

4. Whether there were other miscellaneous trial errors, including lack of sufficiency of the evidence, failure to hold a Miranda hearing, unduly prejudicial and repetitive, judge's active participation during trial, and prejudged and prejudiced by 8<sup>th</sup> circuit opinion.

Greatwalker requests oral arguments for 30 minutes in this matter.

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#### **IV. JURISDICTIONAL STATEMENT**

This is an appeal from a criminal judgment dated December 13, 2002. Greatwalker was found guilty of first-degree murder under 18 U.S.C. § 1111, assault with intent to commit murder in violation of 18 U.S.C § 113(a)(1), assault resulting in serious bodily injury in violation of 18 U.S.C § 113(a)(6), and assault with intent to do bodily harm and without just cause and excuse in violation of 18 U.S.C. § 113(a)(3). All counts are brought under 18 U.S.C. § 1153 (Indian Jurisdiction). Greatwalker was sentenced on December 13, 2002 to life in prison; judgment was filed on the same date. The matter was appealed on December 13, 2002, with Greatwalker requesting a new attorney. The 8th Circuit did not grant him a new attorney.

The District Court has jurisdiction pursuant to 18 U.S.C. § 3231. This Court has jurisdiction pursuant to 28 U.S.C. § 1291 and Fed. R. App. P. 4(b). The Judgment of Conviction is a final judgment that disposes of all claims of the parties.

## V. STATEMENT OF ISSUES

- 1) Whether the jury selection process improperly excluded Native Americans from the jury.
- 2) Whether the government denied the defendant full discovery by failing to disclose or provide agents notes of witness interviews under the government's and Court open file policy.  
United States v. Grey Bear, 883 F.2d 1382 (8th Cir. 1989)  
United States v. Turcotte, 558 F.2d 1382 (8th Cir. 1989)
- 3) Whether the lower Court, in the case where there was evidence that others were involved in the fight and evidence that the defendant's former co-defendant was actually the murderer, erred in refusing to allow into evidence of lie detector tests that showed that he persons who testified against the defendant and were at the scene of the crime at the time failed to pass the test.
- 4) Whether there were other miscellaneous trial errors.

## **VI. STANDARD OF REVIEW**

The first issue relating to the jury selection process is an issue of law and is fully reviewable by this Court; the lower court's decision not to send the marshals out to get additional prospective jurors is reviewable under the abuse of discretion standard.

The other issues relate to decisions by the lower court relating to discovery and trial process and the appropriate standard of review is abuse of discretion.

## **VII. STATEMENT OF THE CASE**

Greatwalker was charged with the death of Linus Walette.

Prosecution alleged that Greatwalker killed Linus Walette on April 1, 2000.

The defendant asserts that he and Walette were involved in a consensual “tough man” fight in the presence of others, that he was knocked down and knocked out for a few moments, and Robert Demery (Greatwalker’s former co-defendant) came behind Walette and struck him in the head with a hammer, and that the others (all witnesses against Greatwalker in his trial) followed the victim outside and killed him. Greatwalker admits to assisting in disposing of the body after Walette was killed, but not to killing him.

This is an appeal from a criminal judgment dated December 13, 2002. Greatwalker was found guilty of first-degree murder under 18 U.S.C. § 1111, assault with intent to commit murder in violation of 18 U.S.C § 113(a)(1), assault resulting in serious bodily injury in violation of 18 U.S.C § 113(a)(6), and assault with intent to do bodily harm and without just cause and excuse in violation of 18 U.S.C. § 113(a)(3).

Greatwalker was sentenced to life by Judge Conmy.



## **VIII. STATEMENT OF RELEVANT FACTS**

Greatwalker was charged with the death of Linus Walette.

Prosecution alleged that Greatwalker killed Linus Walette on April 1, 2000.

Greatwalker was initially scheduled for trial on April 24, 2001.

Instead of going to trial on that date, he plead guilty to first-degree murder with the stipulation that he would receive only 35 years. After pleading guilty in the late morning, Greatwalker requested to withdraw his plea of guilty, asserting that his attorney pressured him into taking the plea. Judge Conmy refused to allow Greatwalker to withdraw his plea, assigned a new attorney (Lynn M. Boughey). Following the making of a formal motion to withdraw the plea in an evidentiary hearing, the Court refused to allow Greatwalker to withdraw the plea. The matter was appealed through the 8th Circuit through Judges McMillian, Fagg, and Riley who agreed with the defendant that he had received an illegal sentence and allowed the plea to be withdrawn, albeit explicitly questioning the wisdom of the trial strategy and providing the world an opinion as to "the evidence against him is overwhelming" even though Greatwalker had not yet had his trial and the only version of the evidence available to the 8th Circuit was the prosecution's version. The decision received wide publicity throughout North Dakota, and the reference to the 8th Circuit questioning Greatwalker's

assertion of his constitutional right to a trial and the 8th Circuit's opinion of the evidence against Greatwalker as being overwhelming was repeatedly raised in the press.

The trial in this matter began on November 12, 2002. On the first day of trial the jury was selected and the prosecution called five witnesses.

Potential juror Hamon stated that he had read about the Greatwalker case in the paper and a week or so prior to the trial had got on the Internet and reviewed the articles on the case. T. at 27-28. Potential juror Roush also stated that he had read the papers in regards to this matter. T. at 33.

Potential juror Montgomery stated that she grew up in a law enforcement family all her life. Three jurors stated that they were familiar with Tribal Reservations (Sgt. Roush T. at 51, 69-70; Felin T. at 70-71; Montgomery T. at 72-73). It should be noted that this incident in this matter occurred in the Northwest division of North Dakota, but the Court moved the trial to the Southwest portion of the state. T. at 59-60. Importantly, none of the jury panel called to be interviewed by the Court or the attorneys were Native American or members of any Tribe. T. at 71. As a result, attorney Boughey requested on several occasions that the Court selection process was flawed, requested a new jury panel, and in the alternative requested that the Court go to the United Tribes College located in Bismarck and have the Marshals

bring back several Native Americans to be on the panel. T. at 75-80. The relevant portion of the transcript follows, beginning at page 78:

15 MR. BOUGHEY: My client needed a few moments to  
16 look, so I thought now would be a good time for me to make  
17 a motion that we start over with a new jury panel.

18 There is, once again -- the second time in three  
19 months -- no Native Americans are even, to my knowledge,  
20 on the panel, but certainly none who have been called. I  
21 do understand the need to move the case to Bismarck, and  
22 that is obviously within the Court's complete discretion.

23 But I request that the marshals -- that we strike this set  
24 of individuals, that we have the marshals bring in people  
25 who are -- include Native Americans -- I'm not sure how

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1 the Court would have to do that -- so that there be at  
2 least a chance of having one Native American on this jury,  
3 which obviously isn't the case.

4 I note for the record that in the Morin case we  
5 had the exact same situation in September, where there

6 were no Native Americans within the panel that was  
7 selected to be possible or potential jurors.

8 I also for the record request an evidentiary  
9 hearing outside of the presence of the jury in which we  
10 can inquire of the Clerk of Court's office how they  
11 arranged to make a jury panel and how they selected the  
12 people who are invited here, because, obviously, it is not  
13 working in reference to getting Native Americans as  
14 possible jurors on a case involving a Native American,  
15 where the alleged crime occurred on a reservation. I  
16 thought I better note that for the record before the jury  
17 is sworn, Your Honor.

18 THE COURT: All right.

19 You are in error in terms of the absence of  
20 Native Americans. I've just been in the back of the  
21 courtroom visiting with a gentleman who is an enrolled  
22 member of the Sioux Tribe, teaching at United Tribes  
23 Technical College here in Bismarck. His name, however,  
24 did not come up in the random selection of the 32 jurors  
25 who were seated.

1           The government, I'm assuming, resists.

2           MR. PETERSON: We do, Your Honor.

3           MR. BOUGHEY: I would request that we put him on  
4 the top of the list and have him as juror number one.

5           THE COURT: Then we would defeat the random  
6 nature of the selection process.

7           Very well. Anything else.

8           MR. BOUGHEY: I understand. No, Your Honor. I,  
9 obviously, needed to make that motion for the record.

10          THE COURT: Very good. You have protected your  
11 record on this point.

12          MR. BOUGHEY: Thank you.

The Court advised Mr. Boughey that unlike the Morin case (which had been tried in September and where no Native American jurors were on the panel whatsoever), there was one Native American juror in the panel that the Judge visited with during one of the breaks but that individual was not selected for questioning. Mr. Boughey requested that that individual be brought in to replace one of the jurors that we requested to be struck, so that

there would at least be a chance to have one Native American on the panel. Judge Conmy refused. Attorney Boughey objected to Hamon and Montgomery as being jurors and requested that they be removed for cause; the Court refused to do so. T. at 77. The jury was selected with Sgt. Roush and Hamon being taken off and potential juror Montgomery being left on.

The Court then provided the jury with preliminary instructions (T. at 82-94), the prosecutor gave his opening statement (T. at 94-113), and the defendant gave his opening statement (T. at 113-123).

Harlene Davis, a BIA Roman Officer, testified to the fact that Greatwalker was a member of the Turtle Mountain Tribe. T. at 124-126. Valentine Cartwright, a BIA Realty Specialist, testified as to the fact that the incident occurred on tribal land. T. at 126-130. Thomas Baker, a BIA Police Officer, testified as to his observations at the crime scene. T. at 131-144. Gordon Green, another BIA Police Officer, also testified as to the crime scene, the arrest of Greatwalker, and the location of Wallet's body. T. at 145-162.

It should be noted that at this time Greatwalker objected to the photos as being prejudicial, and the Court allowed Greatwalker a continuing objection throughout the trial as to his concern that the photos were

prejudicial and that the prejudicial value outweighed the probative value. T. at 150-153.

Wayne Thomas, another BIA Investigator, testified as to finding the body approximately one half mile from Wallet's trailer, as well as the fact that Greatwalker's ID was found in Greatwalker's coat which was located at the crime scene. T. at 163-210, and particularly 204.

On the second day of trial, November 13, 2002, the first matter raised was the fact that there were press reports on the trial in the newspaper, and attorney Boughey specifically provided the Court as Court Exhibit 1 a copy of the press report, and relayed his concerns that the jury should be admonished to not review any press on this case; in addition, there was discussion of the fact that prior press reports specifically included reference to the 8th Circuit's opinion stating that the evidence against Greatwalker was overwhelming, and Boughey noted his concern that although that did not happen in today's paper, it potentially could happen sometime during the trial; the Court admonished the jury in regards to not reading the newspaper or listening to any press reports. T. at 211-212.

Detective Thomas concluded his testimony. T. at 212-214. The prosecution next called Rod Trottier, the BIA Chief of Police, who testified as to the arrest of Greatwalker and the crime scene. T. at 215-231. Stacey

Lorock, BIA Police Officer, next testified as to the crime scene. T. at 231-262. Delmar Langen, Captain of the Police, also testified as to Greatwalker's arrest and the crime scene. T. at 262-273. John Slater, a former Tribal Police Officer, testified as to Greatwalker's arrest and the circumstances surrounding finding the body. T. at 273-281.

The prosecution next called one of its primary witnesses, Jason Deaton, a Special Agent with the FBI. T. at 281-393. During Deaton's testimony, Greatwalker objected again to the photos being offered (T. at 297-298) not only as prejudicial but also repetitious; Greatwalker also raised the issue of whether his statements should come in based on the fact that he may not have properly waived his Miranda rights prior to the statements being provided (T. at 308-312); Greatwalker's attorney specifically requested that the Court allow an evidentiary hearing as to this issue, and the Court declined to do so (T. at 308-312). In addition, although the prosecutor had used an open file policy and had asserted that Greatwalker had been provided all relevant documents relating to this matter, it was discovered during Deaton's testimony that the prosecution had failed to provide Deaton's notes as well as the notes of other witnesses. T. at 357-359. On cross examination, Special Agent Deaton admitted that Greatwalker was cooperative throughout the investigation and Greatwalker claimed that he



was good friends with Linus Walette and that he did not think he would be fighting with him. T. at 388.

The prosecution next called Regina Walette, the wife of Linus Walette, the victim. T. at 393-400. Regina testified that she had four children and that Linus Walette was on probation and had a prison record. Prosecution next called Jessica Farris, who testified that Daniel Greatwalker came to her home on April 1st, the day of the incident, and testified that Greatwalker told her that he had just gotten out of "the big house for five and a half years." T. at 401-408, particularly 406. The prosecution next called Dorothy LaFontaine, the daughter of the victim Linus Walette. T. at 408-421. Dorothy described seeing her dad that day, and that he was doing pushups on the ground with one arm, then she had a discussion with him about money. T. at 413. She also observed Daniel Greatwalker with her dad, and them leaving together. T. at 416-418.

The prosecution next called Samantha Walette, the 12-year-old daughter of Linus Walette. T. at 421-434. The prosecution next called Chad Laducer, who saw Greatwalker with Linus Walette on April 1st. T. at 434-446. Laducer stated that he saw the two individuals dancing around on the road, looking like they were ready to get into a fight. T. at 436. He also

observed the two individuals, Greatwalker and Walette, arguing at the area where they were looking at horses. T. at 440.

The prosecution next called Wayne Slaughter, a Policeman for the city of Raleigh. T. at 448-456. Slaughter testified that he saw Greatwalker between 3:00 p.m. and 4:00 p.m. on April 1st looking for his sister Pam. T. at 451-452.

On the third day of trial, November 14, 2002, the prosecution began with Darrell Trottier, the Chief of Police at Fort Tattan. T. at 456-461. Trottier testified that he saw Greatwalker and Walette together on April 1st in a vehicle heading West on Highway 8 (T. at 457-458), at approximately 4:40 p.m. to 4:45 p.m. The prosecution next called Benedict Nadeau, a neighbor of Linus Belgard. T. at 461-473. Nadeau testified that he went to Belgard's house around 1:00 p.m. or 1:30 p.m. on April 1st to check Belgard's horses. T. at 466. Nadeau also testified that around 5:00 p.m. in the afternoon he heard what he thought was kids yelling and dogs barking around the Belgard residence. T. at 466.

The prosecution next called Linus Belgard, the owner of the truck that was used to transport the body of Linus Walette. T. at 473-534. Belgard received 96 months incarceration as an accessory after the fact. T. at 475 and 1004. Belgard testified that the information which he agreed to in the

plea agreement was not true in regards to his allowing Greatwalker to use his truck. T. at 476-477. Belgard testified that he was at a party at Connie Thifoe's until around 6:00 a.m. on April 1st, then he went to a bar, then a friends place, and then went home. T. at 480-481. Belgard stated that Greatwalker came to his trailer house on April 1st and made statements that he was going to kill some individuals because they were laughing about when his dad got killed. T. at 488. Linus Wallet then came walking into the trailer house. T. at 489. Belgard left the room to go to wash up in the bathroom, and he heard what sounded like somebody being slapped or hit. T. at 491. Belgard came out of the bathroom and saw Linus Walette on his knees with Greatwalker swinging at him, stating you should have fought my dad this way instead of shooting him with a gun. T. at 491-492. Belgard stated that Greatwalker backed up and Belgard thought it was over, but then Walette dove for Daniel's legs and tried to wrestle him down, the fight continued and Belgard went outside. T. at 493. Belgard attempted to leave but had to change a tire on his vehicle, and then came back into the house to get his keys. T. at 495. Greatwalker was standing in the house and Walette was laying by the door with his nose broken and blood all over. Belgard told Greatwalker that Walette was getting blood all over his rug, and Greatwalker grabbed Wallet by the back of his shirt and told him to get up

and they went outside and Walette crawled into the back of the truck. T. at 496-497. Belgard then observed Walette jump out of the box of the truck and running towards to corral; Greatwalker something out of the box of the truck and then chased Walette into the corral. T. at 498-499. Belgard stated that Greatwalker and Walette were fighting in the corral and it looked like Greatwalker was hitting Walette with something. T. at 499-500. By this time Walette was outside of the corral. T. at 500. Belgard then left the area with his nephew, who had just recently driven up. T. at 500. Belgard also testified that before the corral incident, Greatwalker had given him \$200 "for his trouble" apparently relating to the mess that was made on his rug in the trailer. T. at 501. Greatwalker asked Belgard to get him some sweatpants at his mother's. T. at 501. Belgard testified that they went to Greatwalker's mother's house to pick up the sweatpants, and then returned to the trailer. T. at 504. Belgard gave Greatwalker his pants, two beers, and then left. T. at 505. Belgard testified that Greatwalker had blood on his pants from before. T. at 506. When he later got home, his truck was gone and he called the police to report it missing. T. at 509.

Under cross examination, Belgard admitted that he initially claimed to the police that he had not seen Linus Walette for over a year and a half, that no one was at his residence when he left with his nephew, that Bobby

Demery had not been at his residence since December of 1999 or January of 2000. T. at 516-517. Belgard denied that he had told an inmate that was in jail with him that he saw Bobby Demery kill Linus Walette. T. at 518. Belgard denied that he let Greatwalker use the truck, despite the fact that he had admitted to that in his plea agreement. T. at 521.

The prosecution next called Richard Counts, who testified that on April 1st he went to pick up Bobby Demery. T. at 434 Counts observed spots of blood on Greatwalker on his shirt and pants. T. at 546. Demery got into the backseat of the car and they left. T. at 547-548. While backing out, Counts saw Daniel reaching into the vehicle and getting an ice pic and walking towards the trailer house. T. at 548.

On cross examination, Counts admitted that Bobby Demery was his cousin. T. at 554.

The prosecution next called Jason Norquay. T. at 600-627. Jason Norquay testified being at Connie Thifoe's party and leaving the party with Bobby Demery. T. at 558-559. Jason Norquay testified that he continued partying and driving around, until they were told as they were driving around that Greatwalker wanted to see them at Belgard's trailer. T. at 560-564. When Jason Norquay arrived at Belgard's trailer, he saw Greatwalker walking out of the house onto the porch with blood on his clothes. T. at 568.

Jason Norquay was driving with Conway Larocque and Deflarot. T. at 569.

The three of them walked towards the back of Belgard's trailer to where Linus Wallette was laying. T. at 569. Jason Norquay observed a bloody beaten Linus Wallette lying on the door on the South end of the trailer. T. at 570. Jason Norquay claimed that Linus Wallette was breathing and trying to move around and when he would move, Greatwalker would strike him with the pic axe. T. at 570-571. Everybody then went into the trailer house, where Jason Norquay observed blood on the carpet. T. at 572-573. The group then walked back outside to where Linus Wallette was, and Jason Norquay claimed that Wallette was still moving around. T. at 573.

Greatwalker continued to strike Wallette whenever he would move, and grab Wallette by the hair and told him, let's go to death bed. T. at 573. The group then loaded Wallette's body into the back of the truck, and Greatwalker told Jason Norquay to leave and meet him at his mother's house. T. at 574. Jason Norquay did so. T. at 575. Around a half hour to 45 minutes later, Greatwalker and the Laroque's showed up and Jason Norquay observed Greatwalker change his clothes outside at the truck. T. at 576-577. Greatwalker then ordered Bobby Jo Quatrip to take the clothes and burn them. T. at 577. Greatwalker then told his sister to go wash his shoes and wash the truck. T. at 577.

On cross examination, Jason Norquay admitted giving the police false statements, including statements that he had never gotten out of the car at Belgard's trailer, that he didn't see anything there, and that unlike all the other individuals that were at the scene, Jason Norquay was never charged. T. at 582-583. Jason Norquay also admitted that he used to be a drug dealer and sold Meth. T. at 584. Jason Norquay stated that he believed the reason he wasn't charged for anything was because he told the police "what they wanted to hear." T. at 585. In response to a question from the Court, Jason Norquay described Greatwalker as being high on drugs at the time and that he had been "up for days, and he looked strung out." T. at 598.

The prosecution next called Amos Norquay, who was in custody for 33 months for mis-prison of a felony relating to this matter. T. at 602. Amos admitted that he had initially lied to police officers, stating that he denied being at the Belgard residence whatsoever. T. at 603. Amos testified going to the Belgard residence with the rest of the group, and when he arrived there he saw Greatwalker walking off the porch with blood on his shirt and pants; he stated that Greatwalker "told us what had happened" and that Greatwalker stated that he had just gotten into a fight with Walette, that he was almost dead, but wasn't dead yet, and he was going to cut his head off. T. at 610-611. Greatwalker then told Amos Norquay and the two

women riding with him (Kim and Bobby Jo) to leave and they did so. T. at 611.

Amos Norquay also stated that a few weeks earlier Greatwalker had told him that Duane Belgard's brother was the one that killed his dad and one of them was going to pay for it. T. at 613. On cross examination, Amos Norquay admitted that in his first statements he stated that he did not witness any part of the attack and did not have any knowledge of what happened that day. T. at 615. Amos Norquay also admitted that on one of his statements he believed that Bobby Demery could have been the one who had killed Walette. T. at 615. Amos Norquay stated that Greatwalker was shooting up at Connie's party ten times as much as the others, and he shot up about fifteen times and hour. T. at 616.

Benedict Nadeau was recalled by the defense. T. at 620-622. The defense then recalled Amos Norquay who said that Bobby Demery threatened him in reference to his testimony and wanted him to change his statement. T. at 624-625. Bobby Demery told Amos Norquay that he would beat the hell out of him when he got out of jail. T. at 625.

The prosecution next called Kimberly Zaste, the sister of Daniel Greatwalker. T. at 627. Zaste testified that she had received 39 months for providing false declarations relating to this case. T. at 630. Kimberly



testified that when she got to the Belgard trailer, Bobby Jo Poitra was there talking to Greatwalker. T. at 635-636. Kimberly testified that when she arrived at the residence she got out of the vehicle and talked to Greatwalker and Poitra on the porch, and saw blood on Greatwalker's hands. T. at 638. Kimberly asked Greatwalker what happened, and he said he got into a fight. T. at 639. Greatwalker then told Amos to take Kimberly and Bobby Jo Poitra away, and they left. T. at 640-641. On cross examination, Kimberly admitted to lying to the police and to the grand jury because she was afraid of Bobby Demery. T. at 643-644.

The prosecution next called Bobby Jo Poitra. T. at 654. That, Greatwalker's girlfriend. T. at 654-655. Bobby Jo stated that when she arrived at Belgard's trailer on April 1st, she observed Greatwalker standing on the porch full of blood on his jeans and shoes. T. at 661-662. Poitra got out of the car and walked over to Greatwalker and asked what happened, and he didn't answer, but instead told Amos Norquay to get her and Kim out of there. T. at 663. Poitra also noticed blood on the side of the truck. T. at 663. Poitra left and went to Kim Zaste's house. T. at 664. Greatwalker later came to Zaste's house in Linus Belgard's truck now wearing the grey sweatpants; Greatwalker told Bobby Jo to clean the shoes he was wearing because there was blood on them, and she did so. T. at 668. Poitra also

washed Greatwalker's t-shirt, at his instructions. T. at 669. Poitra also testified that she burned Greatwalker's jeans and observed Greatwalker's little sister and niece cleaning up the truck. T. at 673.

Under cross examination, Poitra stated that Greatwalker had told Poitra and his sister Kimberly Zaste after he was arrested to "tell the truth, so you don't get into any trouble." T. at 678. Poitra nonetheless lied to the grand jury. T. at 678. Poitra testified that on the date of the incident she observed Greatwalker doing Meth and drinking, and that he had a lot of crank (Meth). T. at 680-681.

The fourth day of trial occurred on November 15th. The prosecution first called Conway Laroque. T. at 691-726. Conway was in custody for 92 months for accessory after the fact in this case. T. at 692-693. Conway stated that he was at the party at Connie Thifoe's home, and eventually ended up at Linus Belgard's trailer house once Kim Zaste told him that Greatwalker wanted him to come there. T. at 695. When Conway arrived he saw Greatwalker standing in front of the house with blood on his hands and jeans. T. at 698-699. Conway asked Greatwalker what was going on, and he stated he went too far. T. at 699. Greatwalker then told his sister Kimberly and Bobby Jo to leave. T. at 699. Conway then went with Greatwalker behind the trailer house and saw Walette laying there, but he

wasn't sure if he was dead or not. T. at 699. After the girls left, the only people on site were Greatwalker, Conway Laroque, and his brother Jeff Laroque. T. at 701. Conway observed Greatwalker grabbing Walette's head and spreading the wound apart, and Greatwalker stated why don't you walk to your own death bed. T. at 702. Greatwalker then picked up a pic axe and hit Walette in the face with it once or twice. T. at 703. Conway stated to Greatwalker that this guy may still be alive and asked to take him to the hospital and Greatwalker looked at Conway that "wasn't good, so I just left it alone." T. at 703-704. Greatwalker then told Conway to back the truck up, which he did, and then Greatwalker and Conway and perhaps others helped lift Walette's body into the truck. T. at 706-707. Greatwalker then told Jason Norquay to leave, which he did. T. at 708. Conway, Jeff, and Greatwalker left in the truck with Greatwalker driving. T. at 708-709. The three individuals subsequently unloaded the body in the woods. T. at 713. After the body was placed in the woods, Greatwalker received the pic axe from Conway and Jeff and Greatwalker proceeded to hit the body three times with the axe. T. at 715. Greatwalker then told the Laroque brothers to clean the blood off of the truck, which they did; they then left the area. T. at 716. The three then traveled back to Belgard's house, grabbed the sweats and a beer, and then went to Greatwalker's mother's house, (T. at 717)

where Greatwalker's shoes were cleaned by one of his sisters and the truck was cleaned by a few other kids. T. at 717-718.

Following Conway's testimony, Mr. Boughey noted that he had still not received Special Agent Deaton's notes, and that he would need to see those notes before doing the cross examination of Conway Laroque. T. at 723. The Court explained to the jury that under the North Dakota Discovery Program, counsel are not required not to exchange notes unless they are asked for, and when they are asked for it's his policy to require to government to furnish the notes; the Court directed the prosecution to make the notes available to defense counsel; the prosecution asserted that the notes had never been requested, the Court directed Mr. Boughey not to proceed further on that line and order the prosecution to furnish all notes in the matter. T. at 723-724. The Court further stated to the jury that although the rules only require copies of the statements to be delivered after a witness has testified, he has found that that rule just doesn't work and that the counselor should have the statements long before that time, and that is why they have the discovery policy which requires the government, even though the rules don't require it to do so, to furnish "those things" in advance of trial. T. at 725.

The prosecution next called Jeff Laroque, Conway Laroque's brother. T. at 726, 728. Jeff testified that on April 1, 2000 he and his brother Conway, and Jason Norquay were told that Greatwalker wanted them to come to Belgard's residence. T. at 730-731. When Jeff arrived he walked up to the house and noticed blood on Greatwalker. T. at 732. Greatwalker told his sister and Bobby Jo to leave and they did so. T. at 733. After the girls left, the men entered the house and Jeff saw a big red patch on the rug by the door. T. at 735. Jeff watched Greatwalker wash his hands at the sink, and then Greatwalker told them to follow him outside behind the trailer house. T. at 736-737. Behind the trailer, Jeff observed a person full of blood. T. at 738. Conway asked Greatwalker what he did, and Greatwalker said he went too far. T. at 740. Greatwalker then ordered that the truck be backed up to where the body was. Jeff stated that at one point Greatwalker grabbed the man on the ground by his hair and pulled it apart and told him to walk to his own death bed. T. at 743. Greatwalker then hit the man in the face with a pic axe. T. at 744. Greatwalker then ordered someone to back up the truck and the body was loaded into the back. T. at 746-747, 749-750. Greatwalker told Jason Norquay to leave, which he did, and Jeff, his brother Conway, and Greatwalker got into the truck and took the body to a slew. T. at 751. Greatwalker and Conway unloaded the body and Greatwalker drug

him into the trees. T. at 753-754. Greatwalker then asked for an axe, Conway passed it to Jeff, and Jeff gave it to Greatwalker. T. at 757. Jeff observed Greatwalker swinging the axe and heard it hitting something that was not wood, which he assumed was Walette. T. at 760. The three of them left the area. T. at 761. They then went back to Belgard's house where they got Greatwalker's sweats. T. at 762-763. They then went to Greatwalker's mother's house, where Greatwalker ordered Jason to give Poitra his pants. T. at 764-765.

At the end of Jeff's testimony, defense counsel once again objected to the fact that he had not yet received the prosecution notes that were requested two days ago. T. at 768. Out of the presence of the jury, the Court inquired of defense counsel "what other good do you think those notes would be to you?" Defense counsel then showed the Court examples of where there were blank portions of the typed up versions of the tape recorded statements of Jeff and Conway Laroque; in addition, defense counsel referred to the various witness statements that stated that at the time there were four or five people in the room during the fight, that Bobby Demery had come up behind the victim and hit him on the head with a hammer, and that the other individuals watched as Bobby Demery was killing Walette. T. at 771-772. Despite the Judge's statement that the rule

allowing the defense counsel access to everything may be the law "but that's not real," Mr. Boughey continued to insist on having the investigative notes and an opportunity to review them before cross examining the witnesses. T. at 771-772. The prosecutor asserted that under the North Dakota Open File Policy, the government is required only to reserve the agents "rough notes." T. at 773. The Court stated that it believed that the "rough notes are worthless to you" but since defense counsel asked for them and they have furnished them, defense counsel may use them in any way he deemed appropriate.

In addition, the Court asked the prosecutor to visit with the family members and suggested that being in the Court room during the medical examiners testimony may not be "a real good idea." T. at 777.

The prosecution next called the coroner, Dr. Mizell. T. at 779-826. Prior to receiving Dr. Mizell's testimony, the Court advised the jury that there would be some autopsy photographs shown, that defense counsel has a continuing objection to most of the photo exhibits on the basis that they are more prejudicial than probative, and that he is going to allow the government to show the photographs; the Court also advised the jury "It will not be a pleasant hour or so." T. at 778-779. Defense counsel also noted his

objections that the continuous showing of the photos is repetitious and the Court noted that he understands that both objections were made. T. at 779.

Dr. Mizell testified as to the death of Linus Walette, throughout which he used photographs of the autopsy. T. at 779-826. Defense counsel continued to assert the objection and the Court noted repeatedly that the continuing objection was noted for the record. Dr. Mizell testified that the skull fractures and blunt force injuries of the head and face of the victim are significant injuries and would have been potentially lethal, but not immediately lethal; they may have caused death over a period of hours to days. T. at 810. On cross examination, the medical examiner noted that some of the wounds might have been consistent with a fight earlier. T. at 815. Under cross examination, Dr. Mizell, with help from the Court's questioning, finally admitted that the injuries around the neck could have appeared after death. T. at 820-821. Through questioning of the Court, Dr. Mizell stated that nobody could have survived the neck injury. T. at 822-823. Finally, Dr. Mizell also testified that when people are knocked out and get a concussion, a person will not have a memory of events preceding or immediately after sustaining that injury. T. at 824.

That was the end of day four of the trial and the jury was released for the weekend, with a specific admonition from the Court not to read any



press reports, watch any television coverage, or "go on the Internet looking for anything, either recent or in the past." T. at 826.

The trial continued on Monday, November 18th. The prosecution then called Sandra Koch, who works at the FBI laboratory in Washington D.C. T. at 827-861. Sandra testified as to her hair and fiber examinations, stating that the hair found on the shovel was the hair of the victim of Linus Walette (T. at 841), that the hair found on the hammer was also the hair of the victim Linus Walette (T. at 843), that the hair found on a towel was the hair of the victim Linus Walette (T. at 844), and the hair found on the pic axe was the hair of the victim Linus Walette (T. at 846). On cross examination, Sandra stated that throughout her examinations she did not find any of Greatwalker's hair on any of the items provided to her. T. at 853. Sandra also testified that she did not find from any of the evidence sent to her from the autopsy any scrapings in fingernails or other items which matched Greatwalker. T. at 855. Sandra went on to state that she did not find any matches to Greatwalker on the knife in Belgard's residence, the hammer from Belgard's residence, the knife in Belgard's truck, the sledgehammer from Belgard's truck, or the additional knife. T. at 858-859. Sandra also stated under cross examination that she did not receive the vacuumings from the trailer. T. at 860-861.

The prosecution next called Ms. Hobson, a DNA examiner at the FBI laboratory in Washington D.C. T. at 861-922. Ms. Hobson testified that the numerous blood splatterings and other blood samples taken from the crime scene were the blood of the victim, Linus Walette. T. at 879, Passiam. She also testified that the blood on other items, such as the shovel (T. at 882), the seat cover (T. at 887-888), and many other items from the crime scene also had the blood of the victim, Linus Walette. On cross examination, Ms. Hobson confirmed that she had a sample of Greatwalker's blood to compare, and did not find his blood on anything other than on his own arm. T. at 895. Ms. Hobson further stated on cross examination that numerous other items that were sent to the lab were not checked, including the towels taken from the residence where Greatwalker was arrested, the baseball cap he was wearing at the time. Ms. Hobson further testified that all the items found in Linus Belgard's truck failed to show any of Greatwalker's DNA. T. at 901-902. Ms. Hobson further stated that she was not provided any clothing of Ron Count's to evaluate, or any of the clothing from Richard Bearcounts, or any of the clothing from Bobby Demery. T. at 909. Nor was Ms. Hobson familiar with either of the Norquay's. T. at 910. In addition, Ms. Hobson admitted under cross examination that the clothes received from Bobby Demery were submitted approximately five months, eleven days after the

incident occurred, and provided to the authorities through Bobby Demery's attorney. T. at 913-914. Even the Court thought the manner of receiving this evidence was "a little unusual;"

Ms. Hobson once again confirmed that other than the scrapings off Greatwalker himself, she did not find in all of her investigation "any evidence of DNA that had been provided [to her] from the crime scene," other than the shoes analyzed by another individual. T. at 917. Ms. Hobson also admitted on cross examination that numerous samples taken from the Ford Fairmont were not tested. T. at 918.

The prosecution next called Ms. Kidd, a DNA examiner at the FBI laboratory. T. at 924-933. Ms. Kidd testified that she analyzed Greatwalker's tennis shoes and found Linus Walette's blood on them. T. at 927-928.

The government advised the Court that it had concluded its case at the end of day five, November 18th. T. at 935.

The next morning, November 19th, the defense made its Rule 29 Motion of Acquittal. T. at 938-939. At the same time the prosecution submitted a Motion in Limine attempting to prohibit the defense from referring to the lie detector tests taken by the various witnesses in which the witnesses that testified against Greatwalker had failed (or in one case was

inconclusive). T. at 941. Defense requested to allow the jury to know that a lie detector test was taken on witnesses that were testifying against Greatwalker, and be provided the results of those tests. T. at 942. The Court concluded that it would wait to rule on the motion and see "the context in which the issue is raised." T. at 942. The Court then denied the Rule 29 motion. T. at 945.

The defense case began with the defense recalling Wayne Thomas. T. at 945. Thomas testified that he was aware that the victim, Linus Walleto, had won several state tough man competitions. T. at 947. Defense counsel also showed that the notes taken by Detective Thomas were different from the typed up report that he had previously provided to counsel. T. at 953.

The defense next called FBI Agent Jason Deeton. T. at 956. Deeton denied that he quite early in the investigation focused exclusively on Greatwalker (T. at 960), but admitted to telling Conway Laroque on April 6th (just five days after the incident) that if Conway was on an airplane falling from the sky and three people were on the plane, himself, his mother, and Greatwalker, and there were only two parachutes on board, who would get the parachutes? Conway answered "my mother and myself." T. at 962-964. Deeton admitted that only a few days into his investigation he was already telling Conway Laroque the hypothetical about not having

Greatwalker have a parachute in a falling plane. T. at 964. Deeton also testified that after interviewing Conway and Jeff Laroque, he allowed the two of them to leave when they didn't want to speak any longer and come back the next day. T. at 965-966. Deeton also confirmed that he received evidence during his investigation that Bobby Demery had his Linus Wallette with a hammer and that it was Bobby Demery that had killed Linus Wallette. T. at 967, 969. Deeton also admitted that he received evidence that several witnesses were trying to get their "stories straight on April 2, the next day." T. at 972. Despite his admission that Bobby Demery was a prime suspect within a few days, Deeton admitted that "we never took Bobby Demery's clothing until later on when he furnished them with his attorney." T. at 974. Deeton further admitted that he did not get the clothes of Ron Counts or Bear Counts that they were wearing on April 1st. T. at 974-975. Deeton further admitted that the FBI did not check all the items from the Ford Fairlane to determine if Bobby Demery had brought in to that vehicle any blood from the victim. T. at 975-976.

Defense counsel next attempted to inquire about the results of the lie detector tests formed on the witnesses that testified against Greatwalker, but was not allowed to proceed in that direction. T. at 978-979. Defense counsel then attempted to provide a copy of Deeton's typed report,

highlighting those items that were in his notes, as well as a copy of his notes with highlighting as to what did not end up in his report, but the Court refused to allow those items to go in as exhibits. T. at 983. Defense counsel then showed numerous occasions where Deeton's notes were different from his report. T. at 985-989.

The defense next called Linus Belgard again, who testified that he received 96 months for accessory after the fact, and that he had heard that Linus Walette was the winner of the state tough man competition two or three times. T. at 1005. Belgard further stated that as far as he knew Bobby Demery was sleeping in the car when the fight was starting. T. at 1005-1006. Belgard admitted that he "could have" told another inmate while he was jail that Linus Walette liked to fight people. T. at 1008. Belgard further stated that when he went to get Greatwalker a pair of pants that Linus Walette was still alive at that time. T. at 1009. Belgard also testified that his trailer, the place where this incident occurred, burned down right after the wake for Linus Walette, on a Saturday night, not even a week or approximately a week after the incident. T. at 1011. Belgard asserted that the trailer was burned down intentionally by arson and that he had heard rumors about who had burned it down and gave the names to the US Attorney. T. at 1012.

The defense next called Bobby Demery. T. at 1017. Demery testified that was initially charged with murder in this case, and then plead guilty to obstruction of justice and received seven and a half years. T. at 1018. Demery admitted to getting into a fight with Linus Walette in a bar over Peggy Olson in the fall of 1999. T. at 1019. Demery denied hitting Linus Walette on the head with a hammer while Greatwalker was on the ground. T. at 1022. Demery asserted that Ron or Bear Counts were telling people that he was the one that killed Linus Walette because they got 18 months out of it. T. at 1022. Demery asserted that he was charged with the murder of Linus Walette because of a federal case of money laundering against his family. T. at 1022. Demery admitted that when he left the party at Connie Thifoe's residence that he was so drunk that he doesn't remember leaving. T. at 1022. Demery denied telling another prisoner in jail that he helped move Linus Walle's body into the truck, and asserted that he had never touched Walette. T. at 1023. Demery further claimed when asked the specific questions by the polygraph examiner (without referring to that individual as the polygraph examiner) about whether he had hit that man with a hammer and he answered no, and did he hit the man on his head with a hammer, he answered no, and denied that his answers were lies. T. at 1029. Demery also claimed that he offered his clothes to Special Agent Deeton on April

2nd, but he had no other clothes to wear, and Special Agent Deeton "for some reason didn't want them." T. at 1029.

The defense next called Ron Counts. T. at 1031. Counts testified that he was charged out with four different counts, and then plead guilty to misprison of a felony. Counts testified that when the police came to look at the Ford Fairmont (the car in which Bobby Demery left in) they "took a bunch of hair samples and blood stains from the door." T. at 1035-1037. Counts further testified that Bobby Demery was his son. T. at 1038.

The defense next re-called Conway Laroque. T. at 1040. Conway admitted that he provided the police with a lot of incorrect information when he was first interviewed, and that he also lied to the grand jury. T. at 1040-1041. Conway stated that he did not know whether Linus Walette was dead or alive at the time he got there. T. at 1041. Conway stated that he testified before the grand jury that Linus Walette appeared to be dead, and as a result of him testifying in that way the prosecution asserted that he lied to the grand jury. T. at 1042. Conway admitted that he was charged because he told the grand jury that Linus Walette wasn't moving and had no life at all when he saw him. T. at 1042. Defense counsel specifically asked the questions asked by the polygraph examiner (without referring to the



individual being the polygraph examiner), and Conway asserted that he did not lie. T. at 1046.

The defense next re-called Jeff Laroque. T. at 1029. Jeff was initially charged with eight charges, and ended up pleading guilty to accessory after the fact and got 92 months. T. at 1050. Jeff Laroque also denied lying in response to the polygraph examiner's questions. T. at 1053-1054. Jeff denied telling Dickie King that Linus Walette had knocked Greatwalker out and then knocked Bobby Demery out for a while. T. at 1055-1056. Jeff also denied telling Donald Sinclair and another inmate that he killed Linus Walette. T. at 1056.

The defense next called Donald Sinclair. T. at 1057. Sinclair testified that he was presently in jail on an arson charge, and that he had the occasion to visit with Jeff Laroque on or about May 24, 2000, when Jeff told him that he [Jeff] had a pic axe and he [Jeff] hit Linus behind the head with it, and the Jeff Laroque had said that he killed Linus Walette. T. at 1058-1059. On cross examination, Sinclair testified that Jeff had been drinking, but he had not. T. at 1061. Sinclair on redirect stated that Jeff Laroque claimed to be at the incident when Linus Walette was killed and that he [meaning Jeff Laroque] had struck Linus Walette with the axe until he was dead. T. at 1062.

The defense next called Dickie King, who was in custody from March to September of 2000 in a halfway house in Bismarck at the same time Jeff Laroque and Kim Zaste were at that halfway house. T. at 1063-1064. King also testified that while in the halfway house many of the people involved in the various charges stemming from this case were there, and these people told him that Linus Walette was hit on the head with a hammer from behind by Bobby Demery. T. at 1073.

The defense next called Scott Basiack. T. at 1076. Basiack testified that while he was incarcerated at the Burleigh County Jail from August to September of 2000, Bobby Demery was one of his cell mates. T. at 1077. Linus Belgard was there also at that time. T. at 1077. Basiack testified that Linus Belgard told him that the guy that was murdered [Linus Walette] liked to fight, and people were scared of him due to the fact that he was a big guy. T. at 1079. Basiack further stated that Linus Belgard said that Bobby Demery was the individual who killed Linus Walette. T. at 1079.

The defense next called Alvin Demery, Bobby Demery's brother. T. at 1081. The defense also called Floyd Demery, who is Bobby Demery's uncle. Floyd testified that Alvin said that Bobby Demery was cranked out on April 1st, the day of the incident, and he was in "one of those bad moods." T. at 1086.

The defense next called Brenda Hall who is a law enforcement telecommunications officer with the Bureau of Indian Affairs. T. at 1087. Brenda testified that she was in Belcourt in April or May of 2000, visiting her sister Renee Counts. T. at 1088. Brenda testified that Richard Bearcounts had told her that Bobby Demery had told her "Bobby Demery is the one that hit Linus over the head while him and Daniel were going to fight." T. at 1091. Brenda further stated that she had been told that Bobby "had come up behind and hit him over the head with a hammer." T. at 1091. Brenda further testified that Richard Bearcounts had made statements about him flipping through Linus Walette's wallet while some of these things were going on. T. at 1092. On cross examination, Brenda testified that both Ron and Richard Counts were both drinking heavily, and that was a constant thing, "everyday." T. at 1093. Brenda also stated under cross examination that Richard Bearcounts had also stated that Greatwalker had placed his hands in the victims face and was going to bust his skull open and made comments about dragging him to his grave, and Greatwalker hitting the victim when he was already dead. T. at 1094. On redirect, Brenda testified that Bearcounts had said there were five people involved in the murder of Linus Walette. T. at 1095. Brenda stated under redirect that she believed what Richard Bearcounts was saying. T. at 1096.

The defense next re-called Richard Bearcounts. T. at 1099. Defense counsel handed Richard government's Exhibit 3, Linus Walette's wallet, and asked if he recognized it. Instead of stating whether or not he recognized it, Richard stated "I never did know Linus to even wear a billfold." He made this statement before he even looked at the wallet. He was then asked how he knew it was Linus' billfold, and Richard claimed that he had never previously had an opportunity to open it up or look through it. T. at 1099-1100.

The defenses final witness, who was unable to appear, was allowed to testify by a stipulated statement. That witness was Wayne Arnold Bestin, and he provided a statement on June 21, 2000, in which he told the investigators that on April 1, 2000, Greatwalker was "pretty messed up, his eyes looked bad." He further described Bobby Demery as being "he wasn't that bad, he looked okay." T. at 1102-1103. Bestin's testimony was also received as to the fact that on April 1, 2000 he had loaned Shelly Greatwalker a Chevy citation to Daniel Greatwalker and Bobby Demery. T. at 1103.

The defense, at the defendant's insistence, then re-called Special Agent Deeton. Deeton was asked whether or not it was true that he testified before the grand jury on July 19, 2000 that he was basing his testimony on

what happened on Christina Beltaire's statement, and that it was Deeton's understanding that Christina Beltaire is not Native American, and is White. T. at 1113. At this time, the defense rested. T. at 1115.

The defense then renewed the Rule 29 Motion for Judgment of an Acquittal. T. at 1122. The Court then received as Exhibit 207 the warning to the witnesses not to mention the phrase lie detector in answering the questions about lying to the FBI polygraph examiner, and Exhibits 208-211 which provided the polygraph reports which showed that the answers of each of these witnesses were found to be deceptive or in one case inconclusive. Defense counsel once again asserted that "the right of cross examination and general due process should allow my client in this particular case to use the polygraph information in his defense." The Court refused to allow that information in. It allowed the exhibits in only as Court Exhibits that would not go to the jury. T. at 1125-1126. The matter was then recessed for November 19th, and closing arguments and final instructions were provided to the jury on the next day, November 20th. The jury deliberated from 10:48 a.m. to 2:20 p.m., at which time the attorney's and the Court received questions from the jury in which the jury asked for an explanation of aiding and abetting in greater detail, and whether they should be "concerned for our welfare." The Court referred the jury to the

instructions as to the first question. At that conference, the Court advised counsel that one of the jurors had asked the Marshal if they had reason to fear for their safety, and the Marshal said that that question would have to be directed to the Judge. The Court answered the second questions no (T. at 1204-1205) and sent it back to the jury. The verdict was received at 4:15 p.m., in which the jury found Greatwalker guilty on all counts. T. at 1206-1207.

Greatwalker was sentenced on December 13, 2002. At sentencing Carla Jean Davis read a statement from Regina Walette, the widow of Linus Walette. Sentencing T. at 7-8. Davis then made her own statement, and then Linda Walette made a statement. T. at 10-12. Defense counsel placed on the record the fact that even if the jury had found second-degree murder, there would be additional points under Section 3(b)(1.1) or 3(b)(1.4) of the Sentencing Guidelines which would still make the sentence life. The prosecutor, the defense counsel, and the Court agreed that the Court had no choice but to sentence Greatwalker to life. Defense counsel also noted that one of the concerns throughout this case was the affect of the language in the 8th Circuit opinion that referred to the evidence being so strong against Mr. Greatwalker, and that such information was referred to in the newspapers prior to trial and could have potentially poisoned the jury or jury panel

before the trial. T. at 12-13. Greatwalker continued to describe "the way that we as Native Americans are treated in your Court" and Greatwalker asserted that the prosecution had created his statements, to which the Court asks how he could account for all the witnesses who testified that he did those things, and he asserted it was based on the way the prosecutors "wrote my statement." T. at 19. The Court went on to state that, "You know, you talk about treatment Native Americans get in this Court. I have never treated a Native American the way you treated Mr. Walette." T. at 19. Greatwalker then argued with the Judge, stating that he is now trying to cut him off, and the Judge told him, "Alright. Talk. Talk." T. at 19. Greatwalker then told the Judge, "you're just as big a racist piece of shit as Jason Deeton and the rest of them guys - Wayne Thomas, Mr. - Peterson right over here. You know, there ain't no difference between you and all of these guys, you know, except that you got the power to do something." The Court then replied, "Obviously, you have no contrition at all for the brutal murder of Mr. Walette. Is that true?" After some further discussion Greatwalker finally stated, "I guess I could be partially responsible for it, you know."

Given Greatwalker's statements relating to whether or not his attorney had been properly prepared, defense counsel advised the Court that

he considered a waiver of any attorney client privilege relating to the work done on the case, and the Court allowed him to state and describe in detail the level of preparation that had taken place to this complex case. T. at 21-25. Defense counsel reiterated that Greatwalker had the constitutional right for a jury trial, and stated, "he did choose to have this, perhaps as Portia told Shilot, 'be careful if you ask for full justice. You may get more justice than you desire.'" T. at 25. The Court then accepted the factual findings and sentenced Greatwalker to life in prison. T. at 25-26. The Court advised Greatwalker that he had a right to appeal, and he was provided two documents in which to request an appeal, one simply requesting appeal, and the second requesting an appeal and a new attorney. He signed the document appealing and requesting a new attorney. T. at 27.



## **IX. SUMMARY OF THE ARGUMENT**

### **ISSUE ONE: IMPROPER JURY SELECTION PROCESS**

Whether the jury selection process improperly excluded Native Americans from the jury.

### **ISSUE TWO: DENIAL OF FULL DISCOVERY**

Whether the government denied the defendant full discovery by failing to disclose or provide agents notes of witness interviews under the government's and Court open file policy.

### **ISSUE THREE: REFUSAL TO ALLOW POLYGRAPH RESULTS**

Whether the lower Court, in the case where there was evidence that others were involved in the fight and evidence that the defendant's former co-defendant was actually the murderer, erred in refusing to allow into evidence of lie detector tests that showed that he persons who testified against the defendant and were at the scene of the crime at the time failed to pass the test.

### **ISSUE FOUR: TRIAL ERRORS**

Whether there were other miscellaneous trial errors, including lack of sufficiency of the evidence, failure to hold a Miranda hearing, unduly prejudicial and repetitive, judge's active participation during trial, and prejudged and prejudiced by 8<sup>th</sup> circuit opinion.

## **X. ARGUMENT**

### **1. Whether the jury selection process improperly excluded Native Americans from the jury.**

As shown above, defense counsel in this case repeatedly raised his concern that the jury panel did not include a Native American to be selected as a possible juror. As in the Morin case (tried before the same Court in September of the same year as this case), once again there were no Native Americans that were selected to be examined by the random selection process. Unlike Morin, however, at least in this case there was apparently one Native American on the panel, who visited with the Judge during a recess, but he was not one of the individuals called to be a potential juror to be questioned through this process. As a result, none of the jury panel called to be interviewed by the Court and the attorney's were Native Americans or members of any Tribe. T. at 71. Defense counsel suggested on several occasions that the selection process was flawed, requested a new jury panel, and even requested that the Court ask the Marshals go to the United Tribes College located in Bismarck and bring back some Native American individuals who could be potentially placed on the jury. T. at 75-80. When the Court advised Mr. Boughey that there was indeed one Native American

in the panel but was not selected to be interviewed, defense counsel requested that that person replace one of the individuals already on the panel, but the Court declined to do so.

Federal law requires that the jury panel consist of a “fair cross section of the community.” 28 U.S.C. § 1861. Numerous Eighth Circuit cases recognize the due process and equal protection requirements that the jury panel and the jury selection process is fair and representative of the community. See United States v. Grey Bear, 883 F.2d 1382 (8<sup>th</sup> Cir. 1989); United States v. Turcotte, 558 F.2d 1382 (8<sup>th</sup> Cir. 1989); Floyd v. Garrison, 996 F.2d 947 (8<sup>th</sup> Cir. 1993); Roberson v. Hayti Police Department, 241 F.3d 992 (8<sup>th</sup> Cir. 2001). The court, when it became obvious that no Native Americans were on the panel being questioned, refused to take ANY steps to correct the problem, such as sending the Marshal to Bismarck’s United Tribes College and bring back potential jurors for consideration.

The record demonstrates that the Turtle Mountain Reservation is a distinct reservation of six by twelve miles, and that the tribe to which Morin is a member is a distinctive group in the community. There was no representation of Native Americans on the jury pool. The failure of the court jury selection process to include any Native Americans in the jury

panel creates a prima facia case that the system is flawed. North Dakota is not devoid of Native Americans.

**2. Whether the government denied the defendant full discovery by failing to disclose or provide agent's notes of witness interviews under government and court's open-file policy.**

The rough notes of the agent could be considered either jinxed, hacked material under 18 U.S.C. § 3500 or Brady material. See General USB Madrigal 152 F.3rd 777,782 (8th Cir. 1998). Given the testimony in this case which showed that the agent notes were very detailed and sometimes deleted information provided at the time of the interview that did not get typed into the final report, Greatwalker asserts that the agents notes constitutes more than simply "the agents impression of his interview" with the witness, and constitute a statement by the witness. In addition, Greatwalker asserts that the information indeed constitutes Brady material and that the evidence is material since it was properly being used as impeachment evidence relating to the numerous witnesses that were interviewed by the agent, and given the fact that almost all the witnesses that testified against the defendant received plea agreements from the prosecution relating to the numerous lies that they provided to either the police, the grand jury, or both. In a situation where the witnesses have all

(except the one that told the prosecutor what he wanted to hear) were charged with lying to the police or the grand jury, and received deals based on providing information that the prosecution wanted to hear, it is particularly appropriate that the rough notes be considered impeachment evidence and subject to Brady. See United States v. Bagly, 473 U.S. 667,676, 105 S. Ct. 3375, 87 L.Ed.2d 481 (1985).

**3. Whether the lower court, in a case where there was evidence that others were involved in the fight and evidence that the defendant's former co-defendant was actually the murderer, erred in refusing to allow into evidence the results of the lie detector tests that showed that the persons who testified against the defendant and were on the scene at the time of the death failed to pass the tests.**

In United States v. Oliver, 525 F.2d 731, 734 (8th Cir. 1975), this Court adopted a discretionary exclusionary rule of lie detector tests, and recognized that in a proper case polygraph evidence may be admissible. As in Bartholomew v. Wood, 34 F.3d 870,874 (9th Cir. 1994), there is little doubt that the results of the numerous lie detector tests showing that the other witnesses had failed to pass those tests, had they been admissible, would have been information that would have been clearly "of substantial importance." Id. at 874. As the Bartholomew Court stated, Brady

information includes material that bears on the credibility of significant witness in the case. *Id.* Also in *Bartholomew*, "the polygraph results bore directly on the credibility of the most significant witnesses in the case." *Id.* at 874. Also as in *Bartholomew*, "the polygraph results directly supported [the defendant's] theory of the case." Although some Courts have allowed some polygraph results to be used as impeachment, Greatwalker asserts that in this case those results should have been allowed to be used. It should be noted that *Bartholomew* was subsequently vacated on other grounds. In *Washington v. Bartholomew*, 463 U.S. 1203 (1983), subsequently the judgment was reversed and would be *Bartholomew*, 516 U.S. 1 (1995), holding that the failure to disclose that a witness had failed a polygraph test did not deprive the defendant of "material" evidence under the Brady rule absence of reasonable likelihood that disclosure of polygraph results would result in a different outcome at trial. Greatwalker asserts that he should have been allowed to use the polygraph results to show the questionable testimony of the witnesses against him, and that had those witnesses failure to pass the test been disclosed to the jury it would have resulted in a different outcome at trial.

#### **4. Whether there were other miscellaneous trial errors.**

##### **A. Sufficiency of the Evidence**

As to insufficiency of the evidence, a challenge to the sufficiency of the evidence is reviewed by United States v. Fitz, 317 F.3d 878,881 (8th Cir. 2003). Greatwalker asserts that no reasonable jury would have found each essential element beyond a reasonable doubt in this case. See United States v. Harris, 310 F.3d 1105, 1111 (8th Cir. 2002).

**B. Failure To Hold a Miranda Hearing**

As to the asserted Miranda violation, Greatwalker asserts that at the very least the Court should have allowed an evidentiary hearing as to whether the government had violated his Miranda rights.

**C. Photographs Unduly Prejudicial and Repetitive**

As to the use of the gruesome photographs and their repeated use, this Court reviews the District Court's decision as to the admission of evidence under the abuse of discretion standard. United States v. Pane, 119 F.3d 637,645 (8th Cir. 1997). Greatwalker asserts that the photographs used in this case were so gruesome and inflammatory that their prejudicial impact substantially outweighed their probative value, that the lower Court abused its discretion by allowing those photos to come in.

**D. Trial Judge's Active Participation During Trial**

As to the Judge's interference at the trial and questioning of the witnesses, Greatwalker asserts that the District Court often interposed

questions during the trial that were one-sided and therefore denied him a fair trial. See United States v. Dreamer, 88 F.3d 655 (8th Cir. 1996).



## **XI. CONCLUSION**

For the reasons stated above, Greatwalker requests that this Court reverse his conviction, vacate his judgment, and release him from custody.

Dated this 9th day of May, 2003.

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## **XII. CERTIFICATE OF COMPLIANCE ON WORD COUNT.**

I hereby certify that this brief complies with FRAP 32(a)(7)(C); the word count is 13,220 for actual words used in brief. Following Secretary Rumsfeld's lead, I have also employed a larger font as a courtesy for those of us who find it harder and harder to read smaller print. See Woodward, Bush at War 282 (2002).

## **XIII. CERTIFICATE OF WORD PROCESSING PROGRAM.**

The word-processing program is Microsoft Windows 98.

## **XIV. CERTIFICATE OF A VIRUS FREE DISK.**

It is hereby certified that the disk submitted with this brief has been scanned and is virus-free.

Dated this 9th day of May, 2003.

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## **ADDENDUM**

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